DATE: February 25, 1994
CASE NO. 91-ERA-4

IN THE MATTER OF

LINDA PORTER,

COMPLAINANT,

v.

BROWN & ROOT, INC.,

and

TEXAS UTILITIES,

RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

FINAL ORDER DISAPPROVING SETTLEMENT
AND REMANDING CASE

Before me for review is the [Recommended] Order (R.O.) of the Administrative Law Judge (ALJ) issued on June 4, 1993, in this case arising under the employee protection provisions of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (1988). In that Order, the ALJ reviewed the parties' Joint Motion Requesting Approval of Settlement and Stipulation to Dismissal of Complaint with Prejudice, along with the fully executed Settlement Agreement attached thereto. After careful review, the ALJ found the terms of the Settlement Agreement acceptable, except for the confidentiality provisions conditioning the settlement on the issuance of an order placing portions of the record under seal. Consequently, the ALJ issued an Order, dated June 4, 1993, wherein he sealed the terms of the

[PAGE 2]
settlement agreement; declined to seal portions of the record which indicated the existence of a settlement agreement; and granted the parties' request that the issue of sealing portions of the record be certified for interlocutory appeal to the Secretary. The ALJ's Order Granting Interlocutory Appeal

followed on June 8, 1993, stating "Pursuant to my order entered June 4, 1993, and in accordance with 28 U.S.C. § 1292(b), the record in this case is hereby certified for interlocutory appeal to the Secretary of the Department of Labor."

The Secretary issued an Order to Show Cause on September 29, 1993, addressing the ALJ's Order Granting an Interlocutory Appeal. The Secretary's Order denied the request for interlocutory appeal and afforded the parties an opportunity to show cause why the ALJ's June 4 Order should not be reviewed by the Secretary as the ALJ's recommended decision in this case pursuant to 29 C.F.R. § 24.6 (1992). By letter dated October 14, 1993, Respondents indicated they had no objection to proceeding with the Secretary's review of the ALJ's June 4 Order. Complainant did not respond to the Order to Show Cause. [1]

Neither party having shown cause why the Secretary should not proceed with review of the ALJ's Order and the attached underlying settlement agreement, an Order Establishing Briefing Schedule was issued on November 15, 1993, affording the parties an opportunity to file briefs on the issues before me. [2]

Subsequent to issuance of the Order Establishing Briefing Schedule, I received a Joint Notice of Modification of Request for Confidentiality (Joint Notice) which was filed with the ALJ on November 12, 1993. [3] In the Joint Notice, the parties agreed to modify their request for confidentiality, such that only documents disclosing or describing the terms of the settlement agreement are requested to be kept in a restricted access portion of the record. In light of their modification of the confidentiality provisions, the parties requested expedited review of their agreement.

Before commencing review of the ALJ's Order, the Settlement Agreement and the Joint Motion for Dismissal with Prejudice, I must clarify my position on the other motions submitted by the parties subsequent to the ALJ's June 8 Order transmitting the case record to me for review. In the expressed interest of hastening an expedited review, the parties have submitted motions and filings which have not assisted, but rather, have impeded expeditious review of this settlement. The procedural history of this case, as explained above, establishes that the settlement agreement in this case was properly forwarded for Secretarial review on June 8, 1993. *See* ALJ's Orders of June 4 and June 8; Joint Motion Requesting Approval of Settlement and Stipulation to Dismissal of Complaint with Prejudice (Joint Motion for

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Dismissal). Although I declined to accept the interlocutory appeal on the issue of sealing portions of the record, I retained jurisdiction, affording the parties an opportunity to show cause why the settlement and the ALJ's June 4 Order should not be reviewed pursuant to the applicable regulations at 29 C.F.R. § 24.6, as well as an opportunity to file briefs before me. [4]

With respect to Complainant's Motion for Remand, it is clear that the parties reached a settlement in this case and submitted it to the ALJ for review. Upon careful review, the ALJ properly submitted the case to the Secretary pursuant to the terms of the Settlement Agreement entered into by the parties and the Joint

Motion Requesting Approval of Settlement and Stipulation to Dismissal of Complaint with Prejudice. Complainant did not explain in its Motion for Remand why the request for immediate remand for a continuation of the hearing process was sought in contradiction of the terms of the fully executed settlement and joint motion. Regardless, the Secretary has made clear that a party cannot withdraw from a settlement after agreeing to it, or oppose approval of it, at any time up to the time the Secretary approves it. *See Macktal v. Secretary of Labor*, 923 F.2d 1150, 1156-57 (5th Cir. 1991). Accordingly, Complainant's motion seeking a remand for an ALJ hearing, prior to the Secretary's review of the settlement agreement and of the ALJ's Order, must be rejected.

The Motion to Rescind Authorization must also fail. Contrary to Complainant's assertions therein, Complainant's counsel agreed to seek interlocutory appeal when he signed the Joint Motion, dated March 29, 1993, which provided in pertinent part,

> "If the presiding Administrative Law Judge should determine, after preliminary review of this Motion, that the parties' request for the creation of a restricted access portion of the record would in any sense be inappropriate or unwarranted, then the parties respectfully request in the alternative that this issue be certified to the Secretary on interlocutory appeal. The Secretary has indicated that interlocutory appeals may be appropriate in extraordinary cases under circumstances in which interlocutory appeals are permitted in the federal courts pursuant to 28 U.S.C. §1292 or . . . In this case, interlocutory appeal would be appropriate in the event of a preliminary denial of the parties' request . . ."

Joint Motion Requesting Approval of Settlement and Stipulation to Dismissal of Complaint with Prejudice at p. 4. To allow Complainant to renounce the Joint Motion and the fully executed

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Settlement Agreement submitted for review before the ALJ with the intent of disposing of this case, would be contrary to the prior decisions of the Secretary on reviewing settlement agreements, as well as the Court's holding in *Macktal*. *See McFarland v. City of New Franklin, Missouri*, Case No. 86-SDW-00001, Sec. Ord. Approving Settlement and Dismissing Case, Aug. 17, 1993, slip op. at 4-6; *Kim v. The Trustees of the University of Pennsylvania*, Case Nos. 91-ERA-45, 92-ERA-8, Sec. Final Ord. Approving Settlement and Dismissing Cases, June 17, 1992, slip op. at 4; *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Dec., Nov. 14, 1989, *rev'd on other grounds*, *Macktal v. Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991).

Finally, the Joint Notice of Modification of Request for Confidentiality (Joint Notice) will be addressed in the discussion concerning the review of the terms of the Settlement Agreement and Joint Motion for Dismissal, and the ALJ's Order.

Section 210(b)(2)(A) of the ERA, 42 U.S.C. § 5851(b)(2)(A), provides that, "the Secretary shall, unless the

proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint." The Secretary's role is to review the terms of the settlement agreed upon by the private parties to ensure that they are fair, adequate and reasonable to settle Complainant's allegations that Respondents violated the ERA and the TSCA. [5] *Macktal*, 923 F.2d at 1153-54; *Thompson v. U.S. Department of Labor*, 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 10, Sec. Ord., March 23, 1989. slip op. at 1-2. The terms of the present Settlement Agreement have been carefully reviewed along with the entire record in this case and the parties' submissions before me, including an amicus curiae brief filed by the Administrator of the Wage and Hour Division of the Employment Standards Administration (Administrator) and the Respondents' reply briefs. Complainant has not filed a brief before me.

This Settlement Agreement appears to encompass the settlement of claims arising under various laws other than the ERA and TSCA. *See* Page 1, Paragraph 3; Section 3; Section 4. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co., Inc*, Case No. 86-CAA-1, Sec. Ord., Nov. 2, 1987, slip op. at 2, I have limited my review to determining whether the terms of the agreement are fair, adequate and reasonable to settle Complainant's allegations that Respondents violated the ERA and the TSCA.

Sections 2, 5, 7, 8, 9, 11, 12 and 15 of this Settlement Agreement contain provisions dealing with maintaining

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confidentiality of the negotiation, existence and terms of this agreement, and include requests for sealing of documents and placing them in a restricted access portion of the record. Moreover, the Joint Motion for Dismissal reiterates that the Settlement Agreement was submitted for review under seal and requests that the motion and settlement be placed in a restricted access portion of the record because confidentiality is an essential term of the agreement to settle this matter. The parties clearly articulate that the confidentiality provisions are essential and nonseverable terms of this agreement, which can be modified only by written stipulation of both parties.

In their Joint Notice of November 12, the parties stipulated to modify their request for confidentiality so as to conform with the ALJ's Order. Accordingly, the parties now request restricted access for only the Settlement Agreement and any documents disclosing or describing the terms of the agreement, rather than for any document indicating negotiation of a settlement or the existence of an agreement.

The Secretary has consistently held that once submitted for review, the parties' submissions including Settlement Agreements and all related documents become a part of the public record in the case and are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988), requiring federal agencies to disclose requested records unless they are exempt from disclosure under the Act. [6] *See Wampler*

v. Pullman-Higgins Co., Case No. 84-ERA-13, Sec. Final Ord. Disapproving Settlement and Remanding Case, Feb. 14, 1994, slip op. at 3-4; *Corder v. Bechtel Energy Corp.*, Case No. 88-ERA-9, Sec. Ord., Feb. 9, 1994, slip op. at 4-5; *DeBose v. Carolina Power & Light Co.*, Case No. 92-ERA-14, Sec. Ord. Disapproving Settlement and Remanding Case, Feb. 7, 1994, slip op. at 2-3; *Plumlee v. Alyeska Pipeline Service Co.*, Case Nos. 92-TSC-7 and 10, 92-WPC-6, 7, 8, and 10, Sec. Final Ord. Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 5-6.

Subsequent to issuance of the ALJ's Order in this case, I have also addressed the issue of sealing settlement agreements and placing related documents in a restricted access portion of the record pursuant to 29 C.F.R. § 18.56 (1992), and have rejected such requests. *See Corder*, slip op. at 1-5; *DeBose*, slip op. at 2-4; *Mitchell v. Arizona Public Service Co.*, Case Nos. 92-ERA-28, 29, 35 and 55, Sec. Ord. Approving Settlement Agreement and Dismissing Cases, June 28, 1993, slip op. at 2. Similarly, in the instant case, I must reject the parties' request that the Settlement Agreement and other documents indicating the terms of the agreement be maintained under seal and placed in a restricted access portion of the record. In support of my conclusion, I adopt the ALJ's discussion on the

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applicability of the regulations at 29 C.F.R. Part 18, finding that the regulations do not provide authority for placing this settlement agreement and related documents in a restricted access portion of the record in this case. ALJ's Order at 3-4.

For the reasons discussed herein, I cannot approve the confidentiality provisions in the Settlement Agreement and Joint Motion to Dismiss now before me, as they condition approval of the settlement on an order limiting access to public records in the case. I further note that in the interest of preserving confidentiality, this agreement includes provisions limiting the flow of information and communication concerning this complaint. *See* Sections 5, 7, 8, 9, 11, and 12. If such provisions were determined to prohibit Complainant from communicating to federal and state enforcement authorities they would be found unenforceable as contrary to public policy. *See Corder*, slip op. at 6-8; *Wampler*, slip op. at 4; *Anderson v. Waste Management of New Mexico*, Case No. 88-TSC-2, Sec. Fin. Ord. Approving Settlement, Dec. 18, 1990, slip op. at 2-3; *Polizzi v. Gibbs & Hill, Inc.*, Case No. 87-ERA-38, Sec. Ord., July 18, 1989, slip op. at 3-6. [7]

Finally, given that the parties have specifically precluded severance of the confidentiality provisions from the remainder of the agreement, I must reject the Settlement Agreement and remand this case to the ALJ. *See Macktal v. Secretary of Labor*, 923 F.2d 1150, 1154-56 (5th Cir. 1991); *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Ord. Disapproving Settlement and Remanding Case, Oct. 13, 1993, slip op. at 2-3.

Accordingly, I reverse the ALJ's Order granting the request to seal the Settlement Agreement and remand the case for further consideration consistent with this opinion.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Complainant also failed to clarify its Motion for Remand, requesting a remand to the ALJ for completion of the hearing process, which was received in the Office of Administrative Appeals on September 13, 1993. The Secretary sought clarification of this motion in the September 29 Order to Show Cause. *See* Sec. Order to Show Cause at 2-3.

[2] In the Order Establishing Briefing Schedule, it was noted that Complainant failed to clarify its Motion for Remand. Additionally, it was noted that subsequent to issuance of the Order to Show Cause on September 29, the ALJ forwarded a Memorandum dated September 30, 1993, to the Secretary by cover letter of October 5. The ALJ enclosed Complainant's Motion to Rescind Authorization for Interlocutory Appeal and Motion to Schedule a Settlement Conference, along with Respondents' Joint Response thereto. The ALJ correctly determined that the case was properly before the Secretary in accordance with the agreed terms of the fully executed Settlement Agreement between the parties and the ALJ's Orders of June 4 and June 8, 1993. *See* Order Establishing Briefing Schedule at 2, n.1.

[3] I also received a Notice of Withdrawal of Co-Counsel for Respondent Brown & Root, Inc.

[4] Instead of responding to my orders, Complainant continued to file motions and non-responsive filings with the ALJ's office, *i.e.* Complainant's Motion for Remand; Complainant's Motion to Rescind Authorization for Interlocutory Appeal and Motion to Schedule a Settlement Conference; Joint Notice of Request for Modification of Request for Confidentiality.

[5] The Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the employee protection provisions of the ERA, may expose not just private harms, but health and safety hazards to the public. The Secretary represents the public interest in keeping channels of information open by assuring that settlements adequately protect whistleblowers. *Polizzi v. Gibbs & Hill, Inc.*, Case No. 87-ERA-38, Sec. Ord. Rejecting in Part and Approving in Part

Settlement Submitted by the Parties and Dismissing Case, July 18, 1989, slip op. at 3.

[6] The parties should be aware that Department of Labor regulations implementing the FOIA provide that submitters of information may designate specific information as confidential commercial information to be handled as provided in those regulations. 29 C.F.R. § 70.26(b) (1991). When FOIA requests are received for such information, the Department of Labor will notify the submitter promptly, 29 C.F.R. § 70.26(c), the submitter will be given a reasonable period of time to state its objections to disclosure, 29 C.F.R. § 70.26(e), and the submitter will be notified if a decision is made to disclose the information. 29 C.F.R. § 70.26(f). If the information is withheld and suit is filed by the requestor to compel disclosure, the submitter will be notified. 29 C.F.R. § 70.26(h).

[7] Language in Section 11 indicating that the laws of Texas govern would be interpreted as not limiting the authority of the Secretary or the United States District Court under the statutes and regulations. *See Anderson*, slip op. at 3; *Milewski v. Kansas Gas & Electric Co.*, Case No. 85-ERA-0021, Sec. Ord. Approving Settlement Agreement and Dismissing Complaint, June 28, 1990, slip op. at 2.